In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners,

v.

ALFRED H. MAYER COMPANY, *et al.*,

Respondents.

BRIEF OF HENRY S. REUSS
Amicus Curiae

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QUESTION INVOLVED

Does the seller or renter of real property have a constitutionally valid federal statutory duty to treat all citizens wishing to purchase or lease as he would white citizens?

THE FACTS

The complaint alleges the following facts, which are deemed true, since this case comes here on a motion to dismiss:

The petitioners, husband and wife, are Negroes residing in the city of St. Louis, Missouri. Attracted by newspaper advertisements, they inspected houses in the Paddock Woods

subdivision in St. Louis County, which the respondents were building and selling to the general public. The petitioners sought to purchase a home in the subdivision, but the respondents refused to consider their application solely because the respondents have a "general policy not to sell said houses and lots to Negroes." (R.4)

The respondents are an individual and three corporations he controls which are developing, constructing and selling homes in the Paddock Woods subdivision. The subdivision has over 100 homes. More will be constructed, to form a suburban community in St. Louis County housing over 1000 persons, with streets, utilities, a community golf course, tennis and other recreation facilities.

The corporations are incorporated under Missouri law. The respondents operate their business under licenses issued by Missouri and under "various state laws and local ordinances, in particular zoning codes, building codes, banking and lending laws, and numerous laws effecting the transfer and development of real property". Their plans are approved by the County Building Commissioner. Sewer service is furnished by the Metropolitan Sewer District. The zoning plans, "which will assure that this subdivision will retain its value as a successful residential area", are accomplished by the County Planning Commission and the County Council. Transfers of property in the subdivision, including the trust indenture which will restrict uses within the subdivision, will be recorded by the County Recorder of Deeds. Numerous state offices, such as the traffic and highway departments, and the county engineer, will contribute time and resources to the success of the subdivision: The children in the subdivision will be educated in tax-supported schools. State-licensed utilities will furnish electric and gas services to the homes and facilities in the subdivision.

Moreover, Paddock Woods is not an isolated community. It is "enlarged" by the respondents' "other nearby developments" (Paddock Estates, Paddock Meadows, and Wedgewood), all of which are financed by loans insured by the

Federal Housing Administration. These developments comprise a community of some "2700 families".

Paddock Woods will be subject to deed restrictions which will govern the use made by purchasers of the lands and homes in the subdivision. A Board of Trustees appointed by the individual respondent will provide community services, including refuse collections, and have the power to "levy assessments". Such restrictions and assessment authority would be enforceable through judicial action. These functions and powers, the petitioners allege, are "the equivalent of the power to design and enforce zoning ordinances and the power to function as municipal government generally . . . and is in fact an extension or subdivision of the state's authority." (R.5-9)

ARGUMENT

I. THE ACT OF APRIL 9, 1866 – GIVING "ALL CITIZENS, OF EVERY RACE AND COLOR . . . THE SAME RIGHT . . . TO PURCHASE, LEASE, HOLD . . . REAL PROPERTY . . . AS . . . WHITE CITIZENS" – OUTLAWS RACIAL DISCRIMINATION, PUBLIC OR PRIVATE, IN SALES OR RENTALS OF ALL HOUSING CONSTITUTIONALLY REACHABLE BY THE COMMERCE CLAUSE.

A. The Act of April 9, 1966 means what it says – fair housing throughout the land.

In 1865 and 1866, the southern state legislatures enacted a series of Black Codes, consigning the Negro to the position of legal inferiority.

On April 9, 1866 Congress, overriding the veto of President Andrew Johnson, enacted the Act of April 9, 1866. That Act provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and

color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Sec.2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, *or* both, in the discretion of the court.[1]

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[1] The Act of April 9, 1866 was made subject to the revision of December 1, 1873, known as Revised Statutes of the United States, 1873, reprinted in 1877. Section 1 of the Act of April 9, 1866 became Section 1978 of the Revised Statutes (42 U.S.C., Section 1982), and reads as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 2 of the Act of April 9, 1866 disappears, but is partially reenacted (with civil liability substituted for criminal liability) as Sec-

. This language was first enacted by Congress weeks earlier, on March 13, 1866. On March 27, 1866, President Johnson in his veto message said:

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tion 1979 of the Revised Statutes (42 U.S.C., Section 1983), which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1979 of the Revised Statutes in terms reenacts Chapter 22, Section 1 of the Civil Rights Act of April 20, 1871 (17 Stat. 13) which provides:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

In this Brief, whenever Sections 1 or 2 of the Act of April 9, 1866 are referred to, the reference includes their reenactment in Revised Statutes of 1873.

> "In all our history, in all our experience as a people living under federal and state law, no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race. They interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State – an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States."[2]

Congress, in overriding the veto, knew what it was doing – "interfering, for the security of the colored race, with the relations existing between inhabitants of the same state."

It should be noted that Congress, in enacting the Act of April 9, 1866, did not simply endow all citizens with the right to be free of state-imposed discrimination in housing. In Section 1, it gave citizens of every race and color the same right to purchase or lease real property as that enjoyed by white citizens.[3] In Section 2, it went on to make guilty of a misdemeanor any person who, under color of any law "or custom", deprived another of that right.[4]

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[2] 8 Richardson, *A Compilation of the Messages and Papers of the Presidents*, at 3610-11 (1897).

[3] Reenacted by Section 1978, Revised Statutes of 1873 (42 U.S.C., Section 1982).

[4] Reenacted by Section 1979, Revised Statutes of 1873 (42 U.S.C., Section 1980), substituting for "misdemeanor" "an action at law, (or) suit in equity".

A study of the legislative history of the Act of April 9, 1866 yields nothing that collides with its straight-forward meaning.[5]

The respondents are constructing and operating their Paddock Woods subdivision pursuant to a whole host of laws, ordinances, regulations, and "customs" - particularly, the widespread "custom" of denying open housing to Negroes.

Here the petitioners are clearly citizens who have been denied the same right in the purchase of real estate as white citizens enjoy, under Section 1 of the Act of April 9, 1866. And they have been denied this right by the respondents, who are depriving them of their rights under color of laws and customs, within the meaning of Section 2 of the Act of April 9, 1866.

The cases are clear that where a statute imposes a duty, persons who are beneficiaries of that duty are enabled to bring civil suit, for injunction or damages, for violation of that statutory duty.

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[5]See Flack, Horace Edgar, *The Adoption of the Fourteenth Amendment* (1908), pp. 11-54. As with the legislative history of the almost-contemporary Fourteenth Amendment, what Congress had in mind cannot be determined with any degree of certainty. As was said in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 489 (1954): "Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the view of propenents and oppents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among all persons born or naturalized in the United States. Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What they in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."

Wyandotte Transportation Co. v. United States, ___ U.S. ___, 36 U.S. Law Week 4026 (No. 31; December 4, 1967), at page 10, slip copy, citing with approval: *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *North Bloomfield Gravel Mining Co. v. United States*, 88 F. 664, 678-679 (CA 9, 1898); *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 208-209 (CA 6, 1961); *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (CA 2, 1947); Restatement (Second), Torts, Sec. 286.

This principle has been endorsed in numerous cases holding that a person who has been subjected to racial discrimination, in violation of a nondiscrimination statute which contains only penal sanctions, may sue civilly for damages.

WASHINGTON: *Anderson v. Pantages Theatre Co.*, 114 Wash. 24, 194 Pac. 813 (1921); *Randall v. Cowlitz Amusements*, 194 Wash. 82, 76 P.2d 1017 (1938); *Powell v. Utz*, 87 F. Supp. 811 (D.C. E.D. Wash., N.D., 1949).

IOWA: *Amos v. Prom*, 117 F. Supp. 615 (D.C. N.D. Iowa, C.D., 1954); *Humburd v. Crawford*, 128 Iowa 743, 105 N.W. 330 (1905); *Brown v. J. H. Bell Co.*, 146 Iowa 89, 123 N.W. 231, 124 N.W. 901 (1910). See also *Rice v. Sioux City Memorial Park Cemetery*; 349 U.S. 70, 76 (1955) recognizing availability of a civil action.

MICHIGAN: *Bolden v. Grand Rapids Operating Co.*, 239 Mich. 318, 214 N.W. 241 (1927); *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890).

U.S. CIRCUIT COURT OF APPEALS, SECOND CIRCUIT: *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (1956).

Other cases involving application of the same principle are: *Goldstein v. Groesbeck, et al.*, 142 F.2d 422 (1944), *cert. den.*, 323 U.S. 737 (1944); *Fischman v. Raytheon Mfg. Co., et al.*, 188 F.2d 783 (1951).

Hence, the petitioners have a valid statutory right, which the respondents are obliged to respect, and the failure of the respondents to respect the petitioners' statutory right

renders the respondents subject to this civil suit by the petitioners. This proposition is strengthened by the fact that the reenactment of Section 2 of the Act of April 9, 1866, in Section 1979, Rev. Stat. 1873, expressly includes civil liability.

It is certainly true that Congress, in enacting the Act of April 9, 1866, handed the courts a good deal of discretionary authority when it endowed all citizens with "the same right to purchase, lease, and hold real property as white citizens". But it is by no means the first time that Congress has vested the courts with large discretionary authority. One recalls the phrase "combination in restraint of trade" which Congress devolved upon the courts in the Sherman Act of 1890, and the phrase "public convenience and necessity" which in so many aspects of administrative law becomes a matter for the Supreme Court, in the final analysis, to determine.

There remains for consideration whether the Fourteenth Amendment (passed by the U.S. Senate on June 8, 1866, by the House on June 13, 1866 and certified finally by the Secretary of State on July 28, 1868), and various laws enacted to implement the Fourteenth Amendment, in any way narrowed the authority of the Act of April 9, 1866, because the Fourteenth Amendment, and later legislation adopted pursuant to the Fourteenth Amendment, are directed at prohibiting "state action", rather than action by private persons, which impairs privileges and immunities and equal protection.

The language of Mr. Chief Justice Vinson, in speaking for five of the six justices who passed on the case, in *Hurd v. Hodge*, 334 U.S. 24 (1948), does not really narrow the 1866 Act. The Court said (pp. 31-32):

> "In considering whether judicial enforcement of restrictive covenants is the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment, for that statute and the amendment

were closely related both in inception and in the objectives which Congress sought to achieve. . . . It is clear that in many significant respects the statute and the amendment were expressions of the same general Congressional policy."

The Court was in effect saying that governmental action – in the *Hurd* case, action by a court confronted with the enforcement of the racially restrictive covenant in the District of Columbia – was prohibited by both the Act of April 9, 1866, and by federal public policy deriving from the later Fourteenth Amendment. The fact that both dealt with governmental action in no way indicates that the earlier act – the Act of April 9, 1866 – did not also deal with private action, which in fact it clearly did.

B. *The Act of April 9, 1866, is constitutionally valid under the commerce clause.*

We have seen that the Act of April 9, 1866 gives the petitioners a right, and imposes on the respondents a duty, of non-discriminatory treatment in the sale or lease of property in Paddock Woods. The petitioners' amended complaint is thus sustainable *provided the Act of April 9, 1866 is constitutionally valid.*

We start out with the well-established presumption of a statute's constitutionality. 16 Am. Jur. 2d, Section 172. The specific basis for validity is the Congressional power over interstate commerce under Article 1, Section 8 of the Constitution.

The construction, financing, sale, and rental of housing has an enormous impact on interstate commerce. Millions of tons of lumber, iron, bricks, and other building materials and products associated with the construction and improvement of homes move across state lines.[6] So do vast amounts

[6] In 1963, 92,119 tons of portland cement, 108,581 tons of lumber, shingles, and lath, and 41,379 tons of plywood veneer were moved

of the mortgage funds which finance the construction of residences throughout the country.[7] And millions of people change their residence each year by moving to other States.[8]

Moreover, racial discrimination in housing directly injures interstate commerce. It substantially reduces the construction of new homes for Negroes,[9] impairs their movement across State lines, and in numerous other ways adversely affects the interstate movement of material and people.

The power of Congress over interstate commerce and matters affecting such commerce is broad and comprehensive. Congress can prohibit or regulate acts by private persons which affect interstate commerce, including acts of racial discrimination. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The power of Congress over matters affecting interstate commerce does not depend on whether the particular materials or persons are then flowing in the channels of commerce. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34-36 (1937); *Katzenbach v. McClung*, 379 U.S. 294 302-305 (1964); *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946).

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across state lines by railroad. Hearings before Subcommittee No. 5, House Committee on the Judiciary, May, 1966, p. 1360.

[7]In 1964, Mutual Saving Banks held 39.3 percent of their mortgage holdings on real estate located in another state. Hearings before Subcommittee No. 5, House Committee on the Judiciary, May, 1966, p. 1362.

[8]The increasing mobility of the American people emphasizes the national scope and character of the housing industry. Each year, one in five Americans moves to another home. "Americans at Mid-Decade", U. S. Department of Commerce, Bureau of the Census, March, 1966.

[9]If housing were offered on an open basis, the demand for dwellings and for all the materials which go into a housing unit would be substantially increased. Testimony of Hon. Robert C. Weaver before Subcommittee No. 5, House Committee on the Judiciary, May, 1966, p. 1373.

Nor is the power of Congress dependent on whether the effect which the particular case has on commerce is large or small. For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court upheld the power of Congress to apply acreage limitations under the Agricultural Adjustment Act of 1938 to a farmer who sowed only 23 acres and produced from less than 12 acres of excess acreage only 239 bushels of wheat for use on his own farm. In *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946), this Court applied the Fair Labor Standards Act to a newspaper which had a daily circulation of only 9,000 to 11,000 copies, and mailed only about 45 of those copies to another state.

Moreover, the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . ." *United States v. Darby*, 312 U.S. 100, 118 (1941). See also *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *United States v. Sullivan*, 332 U.S. 689 (1948).

These decisions make it clear that Congress is constitutionally empowered to enact legislation prohibiting private persons from engaging in racial discrimination in the sale or rental of residential housing. The Act of April 9, 1866, is precisely such legislation.

II. THE RESPONDENTS ARE ALSO SUBJECT TO THE FOURTEENTH AMENDMENT, AND ITS IMPLEMENTING LEGISLATION, BY REASON OF THEIR INVOLVEMENT WITH STATE AND LOCAL LAWS AND SERVICES.

The right to acquire land has always been regarded as a fundamental aspect of status, power, freedom and security, and, indeed, as one of the essential distinctions between slavery and freedom. The consistent denial to slaves of the right to purchase, hold, or sell property was everywhere understood as a fundamental incident of slavery. Therefore,

almost immediately after the Civil War and the Thirteenth Amendment abolished slavery, Congress enacted legislation to prevent the perpetuation of slavery through the continued use against the former bondsmen of the principal incidents which constituted the status of slavery. Section 1 of the Act of April 9, 1866 enunciated, among other basic rights of free men, "the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . ."

For a time following the Civil War, the discriminations against Negroes engendered in a slave-holding society were being eroded.[10] But as America moved into the 20th Century the forces of prejudice resurged, and after this Court endorsed segregation by race as the substitute for the former dominance by the master over the slave (*Plessy v. Ferguson*, 163 U.S. 537 (1896)), the Negro in America became virtually submerged into a status scarcely above that of slavery.

Segregation was the objective. As the cities grew, racial exclusion from neighborhoods became the tool for achieving that objective. Many cities enacted ordinances to establish racial residential zoning. These were stricken down as unconstitutional after more than a generation of litigation. *Buchanan v. Warley*, 245 U.S. 60 (1917); *Harmon v. Tyler*, 273 U.S. 668 (1927); *Richmond v. Deans*, 281 U.S. 704 (1930); *Glover v. Atlanta*, 148 Ga. 285, 96 S.E. 562 (1918); *Bowen v. Atlanta* 159 Ga. 145, 125 S.E. 199 (1924); *Jackson v. State*, 132 Md. 311, 103 Atl. 910 (1918); *Clinard v. Winston-Salem*, 217 N.C. 119, 6 S.E.2d 867 (1940); *Allen v. Oklahoma City*, 175 Okla. 421, 52 P.2d 1054 (1936); *Liberty Annex Corp. v. Dallas*, 289 S.W. 1067 (Tex. Civ. App. 1927), *aff'd*, 295 S.W. 591, 19 S.W.2d 845; *Irvine v. Clifton Forge*, 124 Va. 781, 97 S.E. 310 (1918); *Birmingham v. Monk*, 185 F.2d 859 (C.A. 5, 1951), *cert. den.*, 341 U.S. 940 (1951).

[10] Woodward, C. Vann, *The Strange Career of Jim Crow* (1957).

Efforts to circumvent these court decisions brought about the hey-day of the restrictive covenant. Designed to accomplish the same objective of racial segregation by excluding Negroes from large portions of the cities and most of the suburban developments, these covenants strategically blocked and surrounded the existing racial ghettos, and through court enforcement accomplished precisely the same function as the racial zoning ordinances. These covenants were widely upheld by the courts of at least 18 States plus the District of Columbia, which for many years mistakenly assumed that this Court's decision in *Corrigan v. Buckley*, 271 U.S. 323 (1926) had fully blessed them. See 3 A.L.R.2d 466, 474-77 (1949).

A generation of litigation was required before this Court ruled that the Fourteenth Amendment precluded enforcement of the "unworthy covenant", either by injunction or by money damages, as a device for maintaining residential racial segregation. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Barrows v. Jackson*, 346 U.S. 249, 259 (1953).

During these years the Federal government also fostered residential segregation, by encouraging and often requiring restrictive covenants in deeds where federal mortgage insurance or guarantees were sought. Because of the vast extent of Federal home mortgage operations racial covenants, routinely included in most deeds, thus helped create and maintain throughout the country thousands of segregated neighborhoods involving millions of people.[11]

In sum, racial residential segregation in modern American cities and suburbs is the result of a long history of governmental participation in encouraging, fostering and compelling it, in clear violation of the Fourteenth Amendment. To suggest that this history of government involvement is no longer relevant is to blind one's eyes to the facts of American life and the history of the development of its cities.

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[11] Abrams, Charles, *Forbidden Neighbors*, 234-236 (1955).

This case illustrates the continued pervasive involvement of government in the rising level of racial residential segregation in our urban society. For without the framework of the multi-faceted laws and mechanisms of local and state government, including corporation and licensing laws, zoning, highways, public schools, utilities and sewers, planning commissions, and financing, underpinned by government funds, efforts, and involvement, the respondents in this case could not possibly make a go of their subdivision developments. They are building whole communities and in effect exercising functions and powers equivalent to those of a municipality.

The respondents have passed beyond the purely private sphere. Their broad community involvement now makes them subject to the principle that when private persons, with the consent or acquiescence of the State, perform functions which are essentially the same as those performed by a government, they become subject to the constitutional obligations of government under the Fourteenth Amendment.

Thus, in *Marsh v. Alabama*, 326 U.S. 501 (1946), a company which owned all the land, including the streets, of a town having over 1500 residents, sought to prevent an outsider from distributing religious literature in the streets. When he refused to leave, he was charged and convicted of violating a general (nondiscriminatory) trespass statute. This Court pointed out "that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the" exercise of the constitutional right, under the First Amendment, to distribute religious literature. (326 U.S. at 505) Therefore, said this Court, the totality of private ownership of the town could not abridge that constitutional right, and the State is not justified in "permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties" (326 U.S. at 509). Although the *Marsh* case came to this Court

in the context of a trespass conviction imposed by a court as an organ of government, it is entirely clear that that decision would also preclude legal power in the company to use self-help to eject the literature distributor from the streets of the company town.

The series of cases culminating in *Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953) makes it clear that any group, no matter how "private" its guise, which governs the choice of elected public officials, is subject to the constitutional requirements against racial discrimination.

This Court has applied the principle in a variety of areas. Thus, a labor union which takes upon itself the function of collective bargaining for its members, and making contracts which would be binding upon them, as authorized by the labor laws, becomes subject to the same restrictions against racial discrimination as are applicable to a government. *Steele v. Louisville & Nashville Rd. Co.*, 323 U.S. 192 (1944); *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952).

In *Evans v. Newton*, 382 U.S. 296 (1966), this Court dealt with a 100-acre tract devised to the City of Macon, Georgia, as a park and pleasure ground for white people only, and operated for many years as part of the City's park system "open to every white person, there being no selective element other than race". (382 U.S. at 301). To facilitate avoidance of the Fourteenth Amendment's ban on racial discrimination, the City trustees were replaced by private trustees. This Court ruled that the park had become imbued with such public character, public function and public responsibility that the substitution of private trustees could not disentangle the park from the restraints of the Fourteenth Amendment, "regardless of who now has title under state law". (382 U.S. at 302). This Court said: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental

character as to become subject to the constitutional limitations placed on state action." (382 U.S. at 299).

In *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 (1952), this Court recognized that a private utility operating under the regulatory supervision of a Public Utilities Commission may be so closely affected by the orders or permission of the Commission that the private utility is subject to the constitutional prohibitions against depriving its clientele of their constitutional rights.

In sum, when the respondents undertook to create complete suburban communities, which partake of many of the aspects and functions of municipalities, they also undertook the obligations which the Constitution imposed upon municipalities, including the obligation not to fence out people solely because of their race.

The respondents, then, are subject to the restraints of the Fourteenth Amendment because their operations in the construction and management of a complete suburban community are imbued with municipal and state functions, and are facilitated by municipal and state aid. But even if the respondents are not sufficiently linked with "state action" to bring them within the direct application of the Fourteenth Amendment, they are subject to Section 1 of the Act of April 9, 1866, reenacted as Section 1978 of the Revised Statutes of 1873 (42 U.S.C. 1982), which is valid under Section 5 of the Fourteenth Amendment, providing that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article" – namely privileges and immunities, due process, and equal protection.

Section 1 of the Act of April 9, 1866 gives the petitioners a right "to inherit, purchase, lease, sell, hold, and convey real and personal property" that is as good – indeed "the same" – as any white citizen has. If a white citizen, can purchase property anywhere, so can a Negro. If a Negro is precluded, solely because of his race, from purchasing property that a white citizen could purchase, the statute is not

satisfied by a showing that the Negro could purchase property elsewhere. His right to purchase, free of racial distinctions, is to be "the same" as that of any white citizen, in every State and Territory. That right may not be taken away by state law (*Buchanan v. Warley, supra*), or by conditions in agreements or deeds enforced either by injunction (*Shelley v. Kraemer, supra; Hurd v. Hodge, supra*), or by money damages (*Barrows v. Jackson, supra*), or by administrative action (*Banks v. Housing Authority of the City of San Francisco*, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. den.*, 347 U.S. 974 (1954); *Taylor v. Leonard*, 30 N.J. Super. 116, 103 A.2d 632 (1954)).

It is true that the discriminatory impact in each of these cases flowed from some form of affirmative government action, either legislative, judicial or administrative. But the statute can also be violated by discriminatory action stemming from private persons. For example, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), which held that the Fourteenth Amendment prohibited racial discrimination by a private restaurant operating in premises leased from a government agency, the only action by the government was its failure to prevent the lessee from discriminating while in the leased premises. This Court emphasized (365 U.S. at 725): ". . . no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."

It is also true that in *Corrigan v. Buckley*, 271 U.S. 323 (1926), this Court held that Section 1 of the Act of April 9, 1866 does not apply to "contracts entered into by private individuals in respect to the control and disposition of their own property". (271 U.S. at 331) That ruling rested on the narrow view expressed in *Civil Rights Cases*, 109 U.S. 3, 11 (1883) that the power of Congress under Section 5 of the Fourteenth Amendment is limited to enacting legislation

"for correcting the effects of . . . prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous." However, such restrictive interpretation of the power of Congress makes Section 5 virtually superfluous, since Section 1 of the Fourteenth Amendment directly invalidates "prohibited State laws and State acts". *Katzenbach v. Morgan*, 384 U.S. 641, 648-649 (1966).

The foundation for the narrow view espoused in *Civil Rights Cases* has been undermined by this Court's more recent ruling in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and by the views expressed by six of the Justices in *United States v. Guest*, 383 U.S. 745, 761-62, 774-84 (1966). In the *Morgan* case, this Court quoted with approval the prescient words of *Ex Parte Virginia*, 100 U.S. 339, 345 (1880): "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." (384 U.S. at 648)

Justice Brennan's opinion in the *Guest* case characterized Section 5 of the Fourteenth Amendment as "a positive grant of legislative power" which authorizes Congress to enact legislation "to achieve civil and political equality for all citizens". (383 U.S. at 784).

The *Morgan* case further holds (a) that Section 5 encompasses the "same broad powers" as are granted to Congress under the Necessary and Proper Clause (U.S. Constitution, Art. I, Sec. 8, cl. 18) to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . powers vested by this Constitution in the Government of United States," and (b) that the boundaries of such legislative power are as broad as those formulated by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 421 (1819), namely:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Accordingly, as Justice Clark's opinion in the *Guest* case put it, "the specific language of Section 5 empowers the Congress to enact laws" to prohibit private persons, "with or without state action", from interfering with or abridging rights guaranteed under Section 1 of the Fourteenth Amendment.

It is well settled that Section 1 of the Act of April 9, 1866, creates a right to acquire, hold and sell property free from impairment by any action of the state. (*Buchanan v. Warley, supra; Hurd v. Hodge, supra*). It is within the competence of Congress, therefore, to decide that private persons shall be forbidden to do anything which impairs that right. By taking over so many of the functions that would otherwise fall upon a municipal government (e.g., sewer and garbage collection, levying assessments, constructing streets, restricting usage of property in conformity with zoning plans), while at the same time excluding Negroes from the community solely because of their race, the respondents have, in effect, interfered with the state's responsibility to maintain the petitioners' right under Section 1 of the Act of April 9, 1866 at the "same" level as that of white citizens of the general public. Viewed in this light, Section 1 of the Act of April 9, 1866 is a constitutional exercise of the power of Congress to protect petitioners' right to purchase, lease, or hold real property against the discrimination of private persons, as well as of the agencies of state government.

The right created by Section 1 of the Act of April 9, 1866 has its correlative duty – not to deprive the citizen of his right to non-discriminatory housing – in two statutes: (1) Section 2 of the Act of April 9, 1866 (reenacted with slight changes by Section 1979, Revised Statutes of 1873, 42 U.S.C. 1983), imposing civil liability upon persons who deprive another of his rights under color of law or "custom"; and (2) 18 U.S.C., Section 241, imposing criminal liability upon persons who "conspire to injure" another in the en-

joyment of his rights.[12] Since the petitioners in the case at bar are within the class of persons these statutes aim to protect, they are entitled to civil relief against the respondents. See cases cited in this Brief, supra, p. 8).

III. THE QUESTION OF FAIR HOUSING HERE RAISED VITALLY AFFECTS THE NATIONAL INTEREST.

This Court's determination that the Act of April 9, 1866 means what it says, and that it is constitutionally valid, could set at rest the divisive question of non-discriminatory housing, a question which threatens to tear the nation apart.

The custom of discriminating against non-whites in housing is everywhere prevalent. It produces the segregated living patterns evident in all our large urban areas. It involves a denial of the inherent right of equal protection of the laws. It leaves psychological scars on millions of Americans, both black and white, who are enjoined by custom from living among neighbors whose skin is of a different shade.

It casts a pall not only over housing itself, but also over employment and education and health and law enforcement and domestic tranquility.

Housing

Segregated housing means inferior housing. Negro Americans occupy a disproportionately large portion of the substandard housing in this country, particularly in urban areas. Negro areas are more densely populated. In Harlem – America's best-known Negro ghetto – almost 240,000 people live in a three and one-half square mile area – one hundred peo-

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[12] Criminal prosecution under 18 U.S.C., Section 241 would be most unlikely, in view of the requirement that specific intent be proven pursuant to the rule of *Screws v. United States*, 325 U.S. 91 (1945) and *Crews v. United States*, 160 F. 2d 746 (CA 5, 1947).

ple per acre. Ninety percent of this housing is more than 30 years old, and nearly half was built before 1900.[13]

The housing of non-white families is consistently of poorer quality than that of white households in the same income levels. This is because the non-white families do not have freedom of choice in the selection of their homes. With the non-white demand for sales and rentals concentrated in the ghetto area, a substandard home in a ghetto is inferior in quality, and more expensive in price than homes available in the rest of the metropolitan community.

In 1960, 44 percent of all non-whites lived in substandard housing, as compared to 13 percent of the white families. Sixty-two percent of the non-white households rented, as compared to 36 percent of the white households. Forty-eight percent of the non-white renters lived in substandard units, as against 19 percent of the whites.

Three times as large a proportion of non-white families (28 percent) lived in overcrowded homes as did white households (10 percent).

This overcrowding was prevalent in all income classes. For example, of non-white families with incomes of $6,000 or more, 25 percent lived in overcrowded conditions. This compares with only 9 percent for whites in the same income classes.[14]

Employment

Segregation in housing adds to the joblessness of Negroes and other minority groups, already at least double the national average. Since 1950, factory and service employment

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[13] Testimony of Hon. Nicholas deB. Katzenbach, Attorney General of the United States, before Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, hearings, June 6-10, 13-16, 21, 22, 24 and 28, 1966. Part I, page 82.

[14] Testimony of Hon. Robert C. Weaver, Secretary of Housing and Urban Development, before Subcommittee on Housing and Urban Affairs, Senate Banking and Currency Committee on August 21, 1967.

has massively moved from the central cities to the suburbs. Because of inadequate transportation, more and more Negroes find themselves cut off by sheer distance from job opportunities.

Education

The American tradition of neighborhood schools concentrates the effect of housing segregation upon education. Segregated housing patterns and traditional neighborhood schools result in the ghetto child's being exposed only to other ghetto children, and receiving an education inferior to that offered in public schools outside the central city area. The bleak outlook of a ghetto child by virtue of his housing becomes even more dim when it is reinforced over and over again in segregated education of inferior quality.

The United States Commission on Civil Rights, in its 1967 report, *Racial Isolation in the Public Schools,* found that:

> "In large part, the separation of the racial and economic groups between cities and suburbs is attributable to housing policies and practices." (pp. 20-25).

The report concludes that school segregation has actually increased over the past 15 years (pp. 81-99), and that desegregation itself has a profound beneficial effect on the performance of students (pp.120-140).

Health

The segregated housing patterns which gave birth to the American urban ghetto also breed poor health.

A high incidence of tuberculosis, high infant mortality rates, and lower life expectancy mark the poor health which stalks the ghetto resident.

The Office of Economic Opportunity recently reported to the Congress that:[15]

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[15]Hearings before the House Committee on Education and Labor on the Economic Opportunity Act Amendments of 1967, Part 2, pages 854-855, June 19, 1967.

1. 50% of poor children have not had adequate immunization.
2. 64% of poor children have never seen a dentist.
3. 43% of all women who have babies in public hospitals have no prenatal care.
4. An infant born to poor parents has twice the risk of dying before reaching his first birthday.
5. The chance of dying before reaching the age of 35 is 4 times greater for the poor.
6. Poor families have:
   a. 3 times more disabling heart disease
   b. 7 times more visual impairment
   c. 5 times more mental illness, retardation, and nervous disorders.
7. Among the poor who are employed, one-third have chronic illness that severly limits their ability to work.

Law Enforcement

The urban ghetto – that inevitable end-result of segregated housing – is a fertile breeding-ground for crime. The hopelessness of the ghetto resident, the substandard environment in which he is trapped, make crime a too-inviting course of action.

One of the burning frustrations Negro residents carry with them in city ghettos is the knowledge that even if they want to and have the means to do so, very often they cannot get out. The white sections of the cities and the suburbs are, to a great extent, shut against them.

In its recent study on six northern cities, the Lemberg Center for the Study of Violence reports that the sense of being forced to live in the ghetto is one of the major causes of dissatisfaction, more widespread even than the discontent over the lack of jobs.[16] The report observes that frustration

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[16] "Six-city Study: A Survey of Racial Attitudes in Six Northern Cities: Preliminary Findings", Lemberg Center for the Study of Violence, Brandeis University, Waltham, Massachusetts, June, 1967, p. 8.

in these two areas – jobs and housing – "are directly perceived by Negroes as being significant causes of riots."

The riots and civil disturbances which plague our urban areas; the growing number of militant separatist movements; and the increasing alienation from the main stream of American life of many Negro Americans – all these have resulted in large part from segregated housing.

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In the last decade numerous states and localities have passed open housing laws, of varying degrees of effectiveness. 22 states now have such laws, including five – in Hawaii, Iowa, Maryland, Vermont and Washington – enacted in 1967. More than 80 counties and cities have also enacted open housing legislation.

Differing treatment of housing discrimination in adjacent municipalities can frequently lead to a complete stalemate, as in Milwaukee, Wisconsin. Milwaukee Negroes, living in a central city ghetto, are marching every night to support passage of a city open housing ordinance. The City refuses to pass such an ordinance until the surrounding suburbs have done so, fearing a flight of white citizens to the suburbs; many of the suburbs, having no Negro residents, feel that open housing is entirely a city problem. Thus, serious as the problem is, the Milwaukee area is bogged down by inaction. Nightly marches continue, and the entire community lives in the midst of severe racial tension.

Concluding that federal fair housing legislation was vital to give national vindication to the principle of equal opportunity, and to end the competition between states and localities to see who could delay longest in meeting the problem of housing discrimination, the Administration in 1966 recommended to the Congress a national open housing measure. The House passed such legislation in the summer of 1966, only to see it killed by a Senate filibuster later that year.

In 1967 the Senate Committee on Banking and Currency held hearings on the Administration's open housing bill, but deferred sending the measure to the floor because of apprehensions concerning the "climate" on the Senate floor. The bill's Senate sponsor, Senator Walter F. Mondale of Minnesota, remarked on the last day of the 1967 session that "in failing to come to grips with the problem of residential segregation and its attendant evils, Congress appears to be oblivious to what has been happening throughout the country."

In fact, Congress legislated a comprehensive fair housing act 102 years ago, in the Act of April 9, 1866, later codified in the Revised Statutes of 1873. It has never been repealed.[17] In the world of 1968, it has as firm a constitutional basis under the interstate commerce clause as would a law enacted in 1968. If Congress, told by the Supreme Court that it has had a valid fair housing law on the books for 102 years, wishes to amend or repeal it, it is open to Congress to follow its parliamentary processes to that end – an adventure which might run into the same obstacles of committee structure and filibuster which have prevented Congress from 1966 onward from enacting the open housing bill presently before it.

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[17] When Congress *wanted* to repeal a civil rights act, it had no difficulty doing so. Thus the Act of February 8, 1894 (28 Stat. 36) expressly repealed the protections for voting rights contained in the First and Second Enforcement Acts of 1870 - 1871. See "Freedom to the Free", U.S. Commission on Civil Rights (1963), p. 55.

And a Civil rights statute does not lapse into desuetude simply because it is old and unused. See *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100 (1953) (District of Columbia public accommodations law of 1872 upheld despite non-use); see also *Louisville and Nashville Railroad Co. v. United States*, 282 U.S. 740, 759 (1931); and *United States v. Morton Salt Co.*, 338 U.S. 632, 647, 648 (1950).

CONCLUSION

There were those in America who predicted chaos when Negro children were first allowed to be educated;[18] when this Court ruled that no State may deny to Negroes, solely because of their race, the right to sit on a jury, or to vote, or to work for a living; when this Court forbade States to engage in racial zoning and outlawed Jim Crow laws in interstate travel, in schools, in recreation places, in courtrooms and in other public places; and, in fact, whenever the Negro made any advance toward first-class citizenship. Their fears have turned out to be fantasies.

So long as residential segregation remains characteristic of urban America – so long as green money in a black hand cannot buy the same kind of housing that green money in a white hand can buy – racial discrimination will pervade every facet of life – homes, jobs, schools, health, the law.

The unfortunate truth is that segregated and unequal housing will not disappear overnight. The backlog of deficiency, the habits of people, the accumulated patterns of residential segregation, the large financial needs of a depressed people will remain as substantial obstacles to full desegregation of our cities.

But we must move ahead. Urban America cannot longer tolerate the crisis of the ghetto. It is now time to stop the cancerous growth of racial residential segregation.

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[18] DuBois, W. E. B., *Souls of Black Folk* (1903), p. 32.

The provisions of the Constitution and the Congressional statutes cited in this Brief provide adequate basis for judicial enforcement of the human right to fair housing.

Respectfully submitted.

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